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REGULATION OF FOREIGN INVESTMENT IN ANGOLA

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1. Introduction

This portion of the report will focus on the laws and decrees by which Angola regulates foreign investment, particularly its foreign investment law. A foreign investment law, however, does not exist in a vacuum. Potential foreign investors are initially attracted by economic opportunities rather than foreign investment laws. Only after they have identified potential profitable opportunities do they turn to the foreign investment law.

The foreign investment law is, however, only the start of the foreign investor's legal inquiry. Prospective foreign investors also need to consider the costs and benefits of the host country's legislation in a variety of areas. For example, labor laws, operating in tandem with immigration laws and visa policies, may make it impossible or excessively costly to bring in needed expatriate managers and skilled employees, or prevent hiring the most qualified people or firing the unqualified. Tax laws may make the fiscal burden unreasonably high, particularly if no tax treaties are in force to prevent double taxation and the host country levies taxes in ways that prevent utilization of foreign tax credits conceded unilaterally by the investor's home country. On the other hand, tax incentives may make an economic venture even more attractive. Price controls may prevent profitable operations, or exchange controls may prevent remittance of dividends and interest. High tariffs and lengthy delays in securing import licenses and in retrieving imports from customs may dissuade investors who need to import expensive equipment and other inputs. An overvalued exchange rate may make exports uncompetitive, thereby discouraging prospective investors who plan to export their products.

Regardless of what is written on the statute books, foreigners are reluctant to invest money or technology in a country suffering from rampant inflation, political unrest, or constantly changing economic policies. They are also reluctant to invest in countries with legal systems that fail to protect property rights (real, contractual and intellectual), that lack independent and efficient judiciaries, or that constantly change the "rules of the game."

Foreign investors, particularly U.S. investors, are often reluctant to invest if the laws and regulations are administered in such a way that violation of the Foreign Corrupt Practices Act is necessary to do business. Although only the United States currently makes it a criminal offense for U.S. persons to bribe foreign officials, on May 23, 1997, the 29 member nations of the Organization for Economic Cooperation and Development (OECD) agreed to sign an anti-bribery convention by the end of 1997 that will require member nations to enact legislation similar to the U.S. Foreign Corrupt Practices Act. Firms are also reluctant to invest where lengthy bureaucratic formalities and permissions create long delays for routine transactions like securing visas, import and export licenses, or foreign exchange to service loans or remit dividends.

2. <u>Criticism of the Basic Approach of Angola's Foreign Investment Law</u>

The basic functions of Angola's Foreign Investment Law, Law 15 of Sept. 23, 1994 (hereinafter the FIL), are to set out the ground rules for foreign investment in terms that are clear and comprehensible to legal counsel for prospective foreign investors, and to provide terms that foreign investors will find attractive. Unfortunately, the FIL poorly performs both these basic functions. Nor do the Regulations to the FIL, Decree 12 of May 5, 1995 (hereinafter the Regulations), which essentially restate the terms of the law, compensate for the failures of the FIL. Both the FIL and the Regulations need to be much clearer and comprehensive than they are presently. They also need serious substantive revisions. The FIL's basic approach to attracting and promoting foreign investment is misguided. The FIL reflects the mentality of a planned economy, an obsolete mentality that surely should not have survived the collapse of socialism in Russia and Eastern Europe. It, as well as many other important laws that impact on foreign investment, also reflects the patrimonialism of Portuguese colonial rule, in which administration was essentially negotiation, bargaining, and contracting about privileges rather than a comprehensible rational legal order.

The FIL requires that foreign investment be screened by a Foreign Investment Bureau, renamed the Foreign Investment Institute in 1996 (hereinafter referred to as the FII), to determine whether the proposal comports with developmental priorities and to negotiate special deals and privileges for certain types of investment. According to Article 3 of the FIL, foreign investment will only be permitted if it does not contravene: (1) "strategies for economic and social development defined by the competent sovereign agencies," (2) "strategic orientation and objectives established in programs of economic policy," and (3) "the legislation in force." The only way that a prospective foreign investor can discover whether his contemplated investment runs afoul of these vague criteria is to submit his proposal and await the FII's response.

All three criteria established by the FIL are wholly unnecessary. It is far more efficient for the market to determine what foreign investment should be made than by bureaucratic screening. If an investor and/or financial institution is willing to place millions of dollars at risk in an Angolan investment, one can presume that there are sound economic reasons for doing so. If not, the investor will go bankrupt. If the foreign investor goes bankrupt, why should the Government of Angola care?

Another company will either acquire the bankrupt company or purchase its assets. In either scenario, the assets will be put to a more efficient use. Does it really matter whether an investor invests in one sector or another? How does one distinguish between "good" foreign investment and "bad" foreign investment? Even if one could agree upon criteria for determining that one type of investment is more valuable than another, which I strongly doubt, why not welcome all foreign investment so long as the business activity is lawful?

Article 3 contains criteria for admissibility of foreign investment that are hopelessly vague and much too limiting. For example, section 1 of Art. 3 indicates that foreign investment will be permitted only if made by "entities of recognized good repute and technical and financial capacity." If applied literally, this would exclude all individuals as well as all new companies. Yet Art. 12 of the Regulations clearly contemplates investment proposals by individuals, and excluding new companies makes no sense whatsoever. How does one determine whether prospective foreign investors are of "recognized good repute?" Would the Alaska oil spill cause denial of a proposal by Exxon? Kaiser had a terrible reputation for building cars in the United States but was welcomed by Brazil, where it launched that country's very successful auto industry. Had it rejected Kaiser's investment because of the company's reputation for building inferior cars, Brazil might not have become one of the largest manufacturers of automobiles in the world.

It is not clear whether Resolution 6 of June 24, 1989, is still in force, or whether it has been implicitly revoked by the new FIL. Resolution 6 directs that foreign investment be channeled into five priority areas: (1) agro-livestock and production of foodstuffs, (2) mineral extraction, (3) fishing, (4) light industry, and (5) construction materials. In a free market economy, market forces should determine in which areas foreign investment is made. This does not mean that the government may not attempt to influence the market by offering fiscal or other forms of incentives to invest in these areas, but foreign investors should be free to invest in any area except those so sensitive they are declared off limits.

At least three serious costs result from the FIL's present approach: (1) lengthy delays in approving proposed foreign investment projects; (2) waste of bureaucratic personnel, who could be more profitably performing other tasks; and (3) the vague criteria produce unbridled discretion, which in turn creates myriad opportunities for corruption.

It would make much more sense to allow automatic entry of foreign investment and to make the FII solely responsible for attracting and assisting foreign investors rather than employing it to screen foreign investment. The market is a much more efficient screening and channeling agency. The Commercial Registries and the Justice Ministry can handle the isolated cases of foreign investment in a prohibited area, such as manufacturing weapons. Moreover, given Angola's past record of political instability and hyperinflation, the problem, except for diamonds and oil, is to persuade foreign companies to invest in Angola rather than to decide which potential investors should be denied the privilege of doing do.

3. Restrictions on Foreign Investment

As a sovereign nation, Angola has the unquestioned right to determine that certain areas are off limits to foreign investors. A crucial function of the FIL should to define clearly those areas that are off limits. Unfortunately, Art. 3(2)(c) of the FIL seems to require that the potential foreign investor review the Angolan Constitution and other legislation on the statute books to figure out what areas are actually off limits. It would make sense to incorporate Law 13/94, which defines these limits, into the FIL. Law No. 13 sets out three different regimes limiting foreign investment in

Angola: (1) absolute reserve, (2) reserve of control, and (3) temporary concession.

A. *Absolute Reserve*

Only four areas are absolutely restricted under Law 13. Three overlap with FIL art. 3(2) and are entirely reasonable: (1) production, distribution and marketing of war materials; (2) banking activity that refers to the functions of the Central Bank and the Mint; and (3) administration of ports and airports. The fourth absolutely restricted area-- infrastructure of the national telecommunications network and basic telecommunication services-- is of dubious rationality. It is a restriction that runs counter to the privatization trend going on in many developing countries and is likely to retard development of modern telecommunications services for Angola. Significantly, Art. 1 of the Privatization Law makes clear that the area of absolute reserve is excluded from privatization.

B. *Reserve of Control*

The three areas where the Angolan government reserves shareholder control are: (1) regular air transport of international passengers and cargo, (2) regular air transport of domestic passengers, and (3) postal communications. These are areas in which foreigners may invest in association with public sector entities, provided the government owns a majority of the share capital.

The government control requirement is confusing. Art. 11 of Law 13/94 states:

> Reserve of control of the State of the economic activities is constituted in the areas set forth below, which may be carried out by firms that result from association with public sector entities, which must be in the position of having a majority of the social capital of the new company with the other entities.

The drafters apparently assumed that if the government entity owned a majority of the stock, it would control the enterprise, but this is not necessarily true. For example, if one divided the capital so that one-third is represented by common stock with voting rights and two-thirds is represented by non-voting preferred, the government entity could own up to 82.9 percent of the total capital (all of the preferred and 49% of the common), without controlling the corporation. Or a foreign investor may own a minority of the voting shares, but have equal or greater representation on the board of directors. Or the foreign investor could wind up actually running the company irrespective of voting rights because the foreign investor had a management contract or because it controlled the technology needed to operate the company.

The case for the government's maintaining a majority of the shares of companies engaged in domestic or international air transport is dubious. Governments have no special expertise in running airlines, and they generally wind up running them badly. Perhaps when air transport was in its infancy, the case for government ownership was stronger, but surely not today when countries everywhere are privatizing national airlines to save money and to promote greater efficiency.

C. *Temporary Concession*

The areas in which foreigners may operate only by temporary concession agreements are: (1) basic sanitation; (2) production, transport and distribution of electric energy for the public; (3) treatment and distribution of water for the public; (4) operation of port and airport services; (5) railroads; (6) internal maritime transport; (7) collective highway transport (i.e, buses); (8) non-scheduled domestic air transport of passengers and cargo; and (9) complementary postal and telecommunications services. The utility of this approach is impossible to evaluate in the abstract, for the crucial questions from the perspective of the foreign investor involve the length and terms of the concessions, the permissible rate of return on the investment, and the associated regulatory costs.

Commendably, the Law on Privatizations, Law 10/94, contains no additional restrictions upon on foreign investors. Unlike privatization statutes in many countries, Angola's law places no limit upon the percentage of shares foreigners may acquire in state enterprises that are being privatized.

A provision in the Law of Economic Activities (Law 10/88), a Socialist law only partially revoked by Law 13/94, curiously prohibits both non-resident nationals and foreigners from carrying out any economic activities in Angola. Since this prohibition can easily be circumvented by setting up an Angolan corporation, there is little reason for forcing people to incorporate if they live abroad but want to operate a business as an individual or through an agent in Angola.

4. The Definition of Foreign Investment

Art. 4(1) (a) of the FIL sensibly defines foreign investment broadly to include "introduction and use" in Angola of capital, equipment or technology. It also includes use of funds that the foreign investor has the right to repatriate under the existing Exchange Control Law for the purpose of investing in the creation of new firms, branches, or other forms of representation of foreign firms, as well as the acquisition of all or part of existing Angolan firms. This is a sensible provision that encourages reinvestment by foreign investors. One problem with this definition, however, is that the term "existing" (*vigente*) used to modify Exchange Control Law is ambiguous as to time frame. Does "existing" refer to the exchange controls in force when the investment is made or when an investment dispute arises? Exchange control laws constantly change, and a foreign investor can easily become a domestic investor if the definition of foreign investment is continually tied to whatever the Exchange Control Law happens to state at any given time.

Foreign investment is also sensibly expanded under Art. 4(2) to include investments by Angolan companies a majority of whose capital is owned by foreign residents or which in some other fashion are directly or indirectly linked to non-residents.

There are, however, no provisions for portfolio investment. In the absence of a well-functioning stock market, this is presumably not a serious problem.

5. <u>The FIL's Four Different Foreign Investment Regimes</u>

The FIL contemplates four different procedural regimes for foreign investments. (There are, however, special regimes for diamonds, petroleum, and mining in general that are regulated in special legislation not even cross-referenced in the FIL; these regimes are discussed in sections 6-8 *infra*.) Which of the four regimes an investment governed by the FIL falls under depends upon the amount of investment involved. But the way in which such amounts are determined is not made clear. Does one count only equity capital contributions, or does one also include debt? Does one include capitalized technology, and if so, how is it valued?

A. *Unregulated (under $250,000)*

Investments of less than U.S. $250,000 are automatically admitted and are subject only to ordinary legislation. Somewhat arbitrarily, they are denied the status of foreign investments under Art. 19 of the FIL and Art. 5 of the Regulations. This *de minimis* approach makes sense only as to admission of such investments, but it does not make sense to deny the benefits of registration if this is essential in order to remit profits and to repatriate capital lawfully at the official exchange rate. Nor should small investors be denied the benefit of the FIL's guarantee of just compensation for expropriation.

B. *Prior Declaration ($250,000 to five million dollars)*

Investments between $250,000 and $5,000,000 are subject to a regime of prior declaration. This means submission of an investment proposal to the FII, accompanied by an array of legal documentation, such as powers of attorney, certified copies of the commercial registration and corporate charters, loan agreements, deeds, and patents. If a joint venture with national interests is involved, the same kind of formal documentation on the national interests is required. According to Art. 23 of the FIL, the FII can reject a prior declaration proposal only for reasons that are strictly legal in nature. Prior to rendering its opinion, the FII must request an opinion from the ministry responsible for the area of investment. The FII's opinion rejecting or accepting the investment proposal must be rendered within 45 days. Unfortunately, the FIL contains no provision for automatic acceptance if that deadline is not complied with.

C. *Prior Approval (five to fifty million dollars)*

Investments between five and fifty million dollars are subject to a regime of prior approval. The foreign investor must submit to the FII all paperwork required for the prior declaration regime plus a technical, economic and financial feasibility study of the project. The FII has the responsibility for analyzing the feasibility study, as well as for considering how the project will impact upon exports, import substitution, production of raw materials, utilization of national inputs, training and use of national labor, project location, the benefits of the project, and its impact on the balance-of-payments. Its opinion rejecting or accepting the project must be issued within 90 days. During this period, the FII should solicit the opinion of an evaluation committee.

There is an additional layer of review in this regime for proposals either approved or not expressly rejected within 90 days. If the project involves between five and fifteen million dollars, the Minister of Planning and Economic Coordination must pass on it; if between fifteen and fifty million dollars, the Prime Minister must approve. From time of submission of the whole project to the FII, the entire process is supposed to take no longer than 120 days, but I doubt whether such time periods are actually complied with.

Proposals may be rejected only for legal reasons or because such investment is deemed undesirable in light of economic and social plans. The criterion of undesirability is sufficiently flexible to justify rejecting an investment proposal for any reason, including refusal to pay a bribe or to accept a local partner whose sole *raison d'être* is to pay off officials.

D. *Contractual Regime (over fifty million dollars)*

Investments involving more than fifty million dollars or involving areas that can only be exploited through temporary concessions are governed by a contractual regime. Also governed by a contractual regime are investments deemed of "special interest to the national economy." This third category requires the FII to consider six criteria: (1) the investment's contribution to regional development, (2) its contribution to technological modernization, (3) its production of a positive foreign exchange balance, (4) the extent to which it is financed by equity capital, (5) adequate endogenization of the technology, and (6) and its quality of employee training programs.

The foreign investor must submit all the documentation referred to in the prior approval regime. The FII has only 30 days to decide whether to permit or reject investment proposals under this regime, and during that period it must consult with the same evaluation committee in the prior approval regime. If accepted by the FII, the proposal must still be reviewed by the Prime Minister or the Minister of Planning and Economic Coordination if a concession or a special interest project involves less than 15 million dollars. If the proposal is not expressly rejected, the terms of the contractual arrangement, including special tax breaks and other incentives, are negotiated directly between the foreign investor and a negotiating committee appointed by the Ministry of Planning and Economic Coordination. The draft contract must subsequently be approved by the Council of Ministers.

Article 31 of the FIL provides that the contract may provide for resolution of all disputes through arbitration, but the arbitration must be held in Angola and Angolan law must apply. Query whether this refers to the Angolan law in force at the time of the contract, or at the time of the arbitration? The FIL is silent on this point. This kind of provision makes arbitration far less attractive to the foreign investor than one held in a neutral place and based upon rules of international law or equity.

6. Mining

The basic legislation on prospecting and mining operations is Law 1 of Jan. 17, 1992, the Law of Geological and Mining Activities. Art. 3 of this law reinforces Art. 12 of the Constitution, making it ineluctably clear that all mineral resources are the property of the State. Private companies can never own the minerals; they may acquire only concessions to prospect for minerals or to mine a deposit.

Whenever it is in the State's interest, prospecting licenses are granted to those who show the technical capacity and financial resources to be able to engage in the proposed type of exploration. There is no minimum term for a prospecting license, but the initial term plus renewals cannot exceed five years. For each renewal, the prospector must abandon 5% of the area of the license. The licenses are a form of contract that contain the resources the prospector agrees to commit, the technology he intends to utilize, and the expertise of his team. Art. 6(d) requires maximizing use of Angolan workers, to be trained at the expense of the prospector. Similarly, Art. 6(e) requires prospectors to use Angolan firms preferentially as subcontractors whenever qualified. The prospector's license should also contain the conditions for the concession of the rights to mine any mineral discoveries. Assignment of prospecting licenses requires permission from the Council of Ministers. Resort to third parties for financing requires permission from Angolan authorities.

Mining concessions should extend for the period necessary to exhaust the mineral reserves, but Art. 13 (1) and (2) of the FIL indicate that the concession will usually be for a lesser period so that its ultimate length can become the subject of new negotiations. Each concession is to contain the applicable tax regime, including a royalty and an income tax. Pursuant to Art. 23 of the FIL, any disputes shall be first resolved by negotiation; if that fails, the parties must resort to arbitration in Angola. The arbitrator is designated by a judge of the Luanda District unless the concession provides otherwise.

This is a classic patrimonialist law in which the investor negotiates about privileges. Even matters that appear to be established in the law are negotiable, often several times. Such legislative style increases the opportunities for corruption since rights and obligations are not set forth clearly in the law. Moreover, the royalty scheme makes Angola less attractive to investors from certain countries, such as the U.S., that concede a unilateral foreign tax credit for income taxes but not for royalties.

7. Diamond Mining

Law 16 of Oct. 7, 1994, the Law of Diamonds, establishes a separate regime for the prospecting, mining, and marketing of diamonds. This law concedes all such rights exclusively to a state monopoly called ENDIAMA-U.E.F. and to mixed-capital enterprises or joint ventures in which this state monopoly participates. All such mixed enterprises or joint ventures, which may include foreign investors, are negotiated on a case-by-case basis and must be approved by the Council of Ministers. Each mixed capital company or joint venture has its own tax, exchange control, and customs regime contained in the contract of concession. Whenever possible, ENDIAMA is supposed to choose its concession partners by a bidding procedure. The procedures for obtaining prospecting licenses and mining concessions are similar to those established in the Mining Law, Law 1 of 1992, but with the important difference that all negotiations must be conducted exclusively with ENDIAMA.

Marketing of diamonds is the exclusive monopoly of ENDIAMA or firms set up exclusively to perform this function. These marketing firms may not receive for expenses a sum greater than 2.5% of the value of the diamonds exported. Their operations are the subject of negotiations and accords with ENDIAMA and its joint venturers in the mining ventures. Diamond smuggling is plainly a major problem, and the law is replete with draconian punishments for those convicted of illegal possession or smuggling of diamonds or even worthless stones sold as diamonds.

This is also a patrimonialist statute replete with opportunities for corruption since everything is subject to negotiation. It has the added feature of a state monopoly, which is bound to produce considerable economic inefficiency because of the lack of competition.

8. Petroleum

Law No. 13 of Aug. 26, 1978, the Law Regulating Petroleum Activities, sets forth a special regime regulating foreign investment in the petroleum sector. Like the Diamond Law, the Petroleum Law creates a state monopoly called SONANGOL and confers upon it all mineral rights to Angolan oil deposits. Foreign oil companies may operate in Angola only in association with this monopoly. SONANGOL enters into concession contracts with the foreign oil companies for both the exploration phase and the production phase.

The Petroleum Law is extremely flexible. Art. 17 permits SONANGOL to participate with foreign oil companies by joint venture, by forming a new company whose capital is divided between them, by sharing production, or by a services contract. Three basic rules govern these participation arrangements. One is that SONANGOL must have the right to participate in the management of the joint enterprise, but does not have to control the enterprise. Issues of control and managerial responsibility are set contractually. Two is that regardless of the type of association, SONANGOL receives a minimum of 51% of the association's profits. If drilling takes place at sea at a depth of at least 150 meters, however, the SONANGOL'S percentage is fixed by a decree of the Council of Ministers. Three is that the contract or corporate bylaws are interpreted against the background of

Angolan law, which fills in any gaps.

If no economically feasible oil deposit is discovered, the foreign oil company loses its entire investment in undertaking the search. On the other hand, if an economically feasible deposit is discovered, Art. 23 recognizes the foreign oil company's right to recover both its expenses and its contractual profit share. The foreign oil company may involve third parties in order to finance its obligations only with specific authorization from the Council of Ministers.

Art. 27 introduces a certain degree of contractual insecurity by providing that the percentage participation of the parties shall be reviewed periodically at the request of the parties or the Minister in charge. It does not say they can be unilaterally changed, but the language implies the making of an offer that cannot be refused. In addition, Art. 28 guarantees SONANGOL the right, if it alleges the national interest requires it, to purchase all of the joint venture's production.

The oil industry is subject to a special tax regime. The basic corporate income tax rate is 50% plus an additional tax of 15.75%. For production sharing arrangements, the tax is 50% of the "profit oil." Royalty payments are imposed on the value of quantities of oil produced at the rate of 20% for the Cabinda area and 16.67% for all other areas. There is also a petroleum training tax levied at the rate of U.S. $0.15 per barrel on petroleum companies, $200,000 on companies in exploration only, and 0.5% of the contract price on all subcontractors.

All disputes about the interpretation, validity, and performance of the contractual agreement are resolved by arbitration held in Angola in accordance with terms established in the contract.

9. <u>Forms of Investment</u>

Art. 6 of the FIL sets out five forms for making foreign investments: (1) transfer of funds from abroad, (2) transfer of funds from Angolan foreign currency bank accounts, (3) importation of equipment, (4) incorporation of credits and other resources eligible for transfer abroad under terms of the Exchange Control Law, and (5) incorporation of technology. All are problematic, and the FIL and the Regulations do not deal adequately with the problems.

The first problem for the Angolan government is how to insure that investment made in the form of cash comes into the country at the official exchange rate. Angola has had a staggering inflation rate and exchange controls. Historically, there has been a sizable spread between the official exchange rate and the parallel exchange rate, ranging as high as 576% and presently about 30%. The rational foreign investor has a huge incentive to bring in as much of his investment as possible at the black market exchange rate, and to remit as much as he can in dividends or interest at the official rate. There is probably no way the government can prevent foreign investors from resorting to the black market for at least part of the funds they expect to invest, for nonregistration of foreign capital does not appear to be a serious cost. If Angola were to impose a supplementary tax on remittances above 12% of registered capital, as Brazil used to do, foreign investors would have a strong economic incentive to register all their capital, but such a tax creates a whole series of other problems.

I cannot tell from the FIL, its Regulations, or supplementary decrees available to me in what currency foreign investments are registered. While it is not irrational for investments to be registered in the currency in which the investor made the investment, most currencies depreciate over time. If it is not already being done, the initial foreign investment registration, as well as reinvestments, should be stated in units of the Special Drawing Right (SDR) of the International Monetary Fund or the U.S. dollar.

The second problem is valuation of foreign investment made in the form of equipment and technology. Art. 4(2) of the Regulations merely says the Foreign Investment Bureau may require the foreign investor to prove how much the equipment or technology is worth. It would be better to indicate a fair market value standard for the equipment, and to use capitalization of estimated earnings or comparable sales or licensing transactions for technology. This is a difficult and tricky area, and foreign investors have a decided incentive to inflate the value of such contributions, particularly if they are not involved in a joint venture where other parties have incentives to resist overvaluation.

The third problem is that the FIL and the Regulations provide no definition of what is technology. To the extent the Regulations deal with the matter, albeit indirectly in Art. 12(2)(i), they suggest a concept of technology limited to patents. But much of the important technology transferred today is not patented; rather it is know how or trade secrets. The FIL and the Regulations should clarify this area. Moreover, while it does not emerge with any clarity from the FIL and the Regulations, Decree 12-C/96, which creates the FII, suggests that the FII is expected to participate in the negotiation and approval of all technology transfer agreements. This is not a desirable course of conduct. It will cause lengthy delays and will make it more difficult for Angolan companies to acquire state of the art technology.

The fourth problem is to insure that companies are adequately capitalized, and that loans made by parent corporations to Angolan subsidiaries are not really disguised capital contributions. Many multinational corporations prefer to undercapitalize foreign subsidiaries, bringing back much of their profits as interest. The advantages are that interest payments are deductible against the subsidiary's local income tax, less money is at risk to the subsidiary's creditors, and interest payments are less likely to be blocked in a balance-of-payments crunch.

10. <u>Remittance of Dividends</u>

Article 8 of the FIL guarantees the foreign investor the right to remit dividends, after deducting for taxes, but only "under the terms of the foreign exchange legislation." This is an area where foreign investors and host governments often have conflicts. It is particularly a problem in Angola, which has had a chronic shortage of foreign exchange and because the exchange controls are constantly changing. Art. 33 of the Regulations guarantees the annual transfer of dividends abroad in accordance with generally accepted accounting principles, but section 3 of this article provides that these remittances can be regulated and staggered if the country has balance-of-payments problems. Unfortunately, the term "balance-of-payments problems" is undefined and subject to wide differences in interpretation. Foreign investors would be far more comfortable with the type of provision found in Colombia's Foreign Investment Law, which guarantees unrestricted dividend remittances unless the country's foreign currency reserves fall below the amount needed to finance 3 months of imports.

Other problems arise in this area in a highly inflationary economy with a constantly devaluing currency. Once a company declares a dividend, it takes a substantial time to secure the foreign currency to remit the foreign currency. Art. 3 of Executive Decree 30/89 mandated that authorizations be issued within a maximum period of 60 days, but obviously delays were often far longer. Executive Decree 20/91 noted that "the process of evaluation of requests for transference of profits and dividends have been delayed, given the necessity of studies, often complex and dependent, at times, on complimentary opinions and analyses..." Executive Decree 20/91 quite sensibly applied the exchange rate in force at the date the income tax on the remitted profits was paid rather than the date the remittance was actually made. This meant that the Angolan government bore the exchange loss for any delays after that point, which was fair since the government had use of the deposited funds during the interval. But this sensible regime was soon overturned by the Finance Ministry's Dispatch No. 62 of Oct. 23, 1992, which decreed that the exchange rate used for dividend transfers for 1991 should be NKz 57.62, the weighted average exchange rate for the year. This was a much less favorable solution to the problem of delay for foreign investors seeking to remit dividends, and its retroactive imposition obviously prejudiced investors who remitted dividends early in the year and gave a windfall to those who remitted later.

11. Repatriation of Profits

Art. 8 of the FIL guarantees the foreign investor the right to repatriate the proceeds from the sale of investments, including gains, but it says nothing about reducing one's capital or partially liquidating one's investment. This is a privilege that should be guaranteed to the foreign investor.

Article 34 of the Regulations indicates that the foreign capital must remain in the country for at least six years. This requirement is too long and may discourage a significant number of potential foreign investors.

12. Exchange Controls

Angola has long had a complex and constantly changing foreign exchange controls that create serious problems for foreign investors. The basic exchange control legislation is contained in Law No. 9 of July 2, 1989, the *Lei Cambial*, and Decree No. 16 of April 22, 1994. This legislation provides that all foreign exchange generated by petroleum exports will be purchased directly by the National Bank of Angola (BNA), and that all other foreign exchange from exports or any other transactions by residents must be sold to financial institutions authorized by the BNA (i.e., commercial banks) within 30 days of receipt unless the exporter receives special permission to retain them. Lawful purchases of foreign exchange must be effectuated through commercial banks or exchange houses operating under the control of the BNA at a unified exchange rate fixed by the BNA.

All imports and exports require licenses from the Ministry of Commerce. Except for government and oil transactions, all foreign exchange transactions must be carried through the commercial banks or authorized foreign exchange dealers. All remittances for dividends, royalties, technical assistance, and interest payments require BNA authorization. The BNA sells allocations of foreign exchange to the commercial banks based upon administrative priorities. Frequently, the amount sold covers only transactions on the BNA's priority list, leaving other transactions to await availability of foreign exchange at a less favorable exchange rate. Because foreign exchange is severely rationed and because governmental operations have top priority, the private sector frequently encounters delays of many months in obtaining foreign exchange. Many are forced to resort to black or parallel market operations to secure needed foreign exchange or to smugglers to secure needed goods.

Both residents and nonresidents, be they legal entities or individuals, are allowed to hold foreign exchange accounts in Angolan banks. Nonresidents need authorization from the BNA but residents do not. These accounts can be credited with export earnings, foreign currency transfers from abroad, foreign bank notes or traveler's checks. They can be debited with exchanges for Angolan currency or establishment of letters of credit or other types of international payment instruments. Funds may not be transferred from one such account to the other, nor may the commercial banks issue checkbooks for such accounts.

The shortage of foreign exchange and the policy of allowing residents and non-residents to maintain foreign currency accounts have led to firms and individuals importing goods or equipment with their own foreign currency funds. Decree 16 of July 29, 1996, has regulated this practice in a fairly bizarre way. The decree permits those engaged in productive economic activity to import raw materials, equipment, spare parts, and intermediate consumer goods by using funds deposited in their own foreign currency accounts in Angolan banks. Presumably, the reason for using one's own foreign currency funds is to avoid the bureaucratic hassle of securing foreign exchange through official channels. But to utilize this alternative channel, the importer is forced to deal with several other bureaucratic layers. He must secure authorization from the Ministry of Planning, but this can be done only with a favorable opinion from the ministry under whose aegis the importer operates. The importer must also comply with the BNA's directives in Instruction 3/96, which I have not seen. Moreover, the only importers who can take advantage of this concession are those whose activities generate a gross increase in value superior to 25% of the amount of the sale and/or the cost of the foreign exchange does not exceed 70% of the cost of the product. These figures seem wholly arbitrary and make little sense.

13. Labor

Art. 13 of the FIL requires foreign investors to promote employment of Angolan workers and to give them professional training and social benefits identical with their foreign workers. Firms that employ a high percentage of Angolans and provide them training and benefits equal to foreign workers receive fiscal incentives and opportunities. Wisely, the statute eschews quotas or ratios and resorts to the carrot rather than the stick. The policy expressed and the means for implementing it are commendable.

Unfortunately, other statutes and decrees, which are not cross-referenced in the FIL, may create serious problems for certain foreign investors. For example, Article 1 of Decree No. 5/95 requires that at least 70% of a firm's employees must be Angolan if the firm has more than 5 employees. While this requirement can be waived if the company can convince the Labor Administration that needed specialized workers are not available in the local labor force, the hassle may dissuade firms that need a high percentage of highly skilled employees from investing in Angola.

Even more problematic for the foreign investor is the General Labor Law, Law 6/81, a relic of the Socialist past. Article 3 makes this labor law regime applicable even to managers contracted abroad to work in Angola, a feature that creates unnecessary problems for foreign investors. Article 9 gives the workers the right to participate in management of private firms, and Article 12 extends this right to unions. This is a clear disincentive to any potential foreign investor. Article 22 nullifies any labor contract that contravenes the national economy or is opposed to the revolutionary process. This anachronistic feature makes little sense today. The procedure for filling job vacancies under Arts. 94-102 is a model of economic inefficiency. It can force firms to fill positions with unqualified workers until such persons fail a test to determine whether they are qualified for positions they are currently holding. Arts. 102 and 104 provide that wages are to be determined by the government in accordance with socialist principles. Article 122 provides for a huge number of paid absences. This labor law regime is a potential nightmare for foreign investors.

14. Work Visas for Foreign Employees

Still another problematic statute for foreign investors is Law 3 of 1994, which makes obtaining work visas for foreigners difficult and time-consuming. Art. 25 states that work visas are valid only for one year and must be continually renewed. Such visas may be issued only after prior authorization from the Director of Immigration, and he needs a prior favorable opinion from either the Ministry of Public Administration for public sector employment or from the appropriate supporting ministry for private sector employment. Art. 27 requires posting of a bond to secure repatriation expenses. While Decree 48/94, which regulates Law 3, seems unexceptionable on its face, in practice securing visas for foreigners to work in Angola involves a lengthy bureaucratic hassle. The present requirements posted on the Internet indicate a further requirement of testing negative for HIV virus. The FII should be given authority to expedite and to facilitate issuance of visas to foreign employees brought in by foreign investors.

15. <u>Technical Assistance</u>

The rules regulating the contracting of technical assistance do not emerge with clarity from the materials currently available to me. Decree-Law No. 4-C of June 3, 1996, authorizes the Foreign Investment Institute (FII) to evaluate and authorize foreign technical assistance contracts, but the Organic Law sets forth no criteria or procedures for doing so. Decree 26 of June 26, 1992, indicates that the contracting of foreign technical assistance is essentially up to the free will of the parties and depends only upon exchange control policy and, in the case of government agencies, budgetary constraints. Leaving this area up to the market makes much sense, but it would be useful to foreign investors to clarify whether the FII actually plays any screening role in these contracts or simply registers them.

16. <u>Law of Crimes against the Popular Economy (Law 9/89)</u>

This statute is totally incompatible with a market economy and should be a prime candidate for immediate repeal or major reform. It has the potentiality for creating great mischief, particularly for foreign investors. Moreover, if enforced, it would deter a great deal of useful economic activity.

The Law of Crimes against the Economy is predicated upon the assumption of a totally regulated economy and makes no sense outside such an economy. Art. 19 punishes with criminal sanctions anyone who produces any good or renders any service without governmental authorization or license. Art. 21 is bizarre. It makes it a crime to register, publicize or permit use abroad of any invention perfected with Angolan labor, materials or finances without authorization from a competent authority. Why should Angola care if an Angolan company registers in France an invention developed in Angola? In developed countries, companies constantly patent inventions abroad developed at home without seeking permission from their home country. Article 22 is totally off the wall. Does Angola really intend to put people in jail for a year for speeding?

Many of the provisions of this law are devoted to imposing penal sanctions on government employees who fail to comply with central planning directives. Query whether such provisions have any place in a free market economy. For example, under Art. 27, a bureaucrat can be sentenced to two years in prison for producing an inferior product. Arts. 32 and 33 make hoarding and speculation crimes. In a free market economy, people who produce inferior products go out of business, and speculators help make markets function smoothly. If the market disciplines poor quality and determines quantities and prices, do you need the criminal law? Moreover, some of this Law's provisions, such as Art. 29, confuse civil liability concepts, such as breach of warranty or product liability, with criminal liability. Criminal liability can be imposed even if the defendant acted only with negligence rather than with any intent to harm. Who wants to locate a factory in Angola and face the possibility of going to jail for negligence in manufacturing a product?

17. Banks

The efficient operation of foreign banking institutions in Angola is vital to foreign investors. Such banks facilitate the transference of funds in and out of Angola and securance of confirmed letters of credit for import-export operations. The Law of Financial Institutions, Law 5 of April 20, 1991, commendably permits foreign banks to operate in Angola, provided they are authorized by the Finance Minster and the Council of Ministers. Other than securing necessary authorizations and compliance with usual requirements for capitalization and integrity of principal officers, foreign banks are subjected only to the reasonable requirement that at least half their administrative and technical staffs be residents of Angola.

Decree No. 37 of Aug. 7, 1992, provides fairly strict regulation of foreign banks' representation offices. Authorization from the Governor of National Bank of Angola is required. Such offices are subject to Angolan law and the jurisdiction of Angolan courts with respect to any Angolan operations, and they must deposit a bond to guarantee fulfillment of their Angolan obligations. Curiously, each office may have a maximum of 6 employees (8 with special permission), 3 of whom must be Angolan citizens. Such offices may not carry out any type of banking operation, acquire shares or capital participation in any firms in Angola, participate in any share offerings, make any contracts that interfere with monetary or financial markets, rent real estate other than needed for their office, or represent third parties. The manager of the office can be a foreigner, but must understand Portuguese.

18. <u>Intellectual Property Rights</u>

Angola's Industrial Property Law, Law 3 of Feb. 29, 1992, generally resembles the patent and trademark legislation of developed countries. It provides patent protection for 15 years for inventions and for 5 years (twice renewable) for utility and industrial design models. It provides protection for registered trademarks, including those first registered abroad. Nevertheless, it also contains several features that make it unattractive to foreign investors.

First, Art. 4(d) prohibits the patenting of "foodstuffs, chemical-pharmaceuticals and medicines destined for humans or other animals." (It is, however, possible to patent the apparatus or process by which they are manufactured.) In other countries such restrictions have produced a great deal of pirating of drugs and medicines, an inability to obtain most recent medical treatment, and serious trade battles with the U.S. and other industrialized nations. Countries that have had similar restrictions, such as Argentina, Brazil, and Mexico, have recently enacted legislation providing patent protection for such important inventions. A strong case can be made for Angola following suit.

Second, Art. 11 provides for compulsory licensing if a patent is not being worked in the country within three years of registration, or if its being worked is interrupted for a period of one year. Art. 11(3) makes clear that the working requirement cannot be satisfied by importation except when an international agreement to which Angola is a party so provides. In addition, Art. 11(2) permits compulsory licensing even if the patent is being worked if such working does not "meet the needs of the market." In such event, the patent owner has the right to demand an equitable remuneration, presumably determined by a court under undefined standards if the parties fail to reach an accord.

Third, Art. 14 (1) (c) provides that a patent automatically lapses if it is not worked in the country within 4 years of concession. It also lapses if its working is interrupted for a period of 2 years unless due to a duly proven *force majeure*. Design or utility model patents automatically lapse if not worked in the country for one year. Since firms frequently register patents world-wide to avoid pirating even if they have no intention of working them in every country, such a provision tends to encourage piracy.

Fourth, Art. 35(e) prohibits registration of a trademark already registered to someone for the same products or services. There is no exception for "notorious marks" as provided for in Art. VI *bis* of the Paris Convention on the Protection of Intellectual Property, which requires contracting states to deny or invalidate registration of a trademark that is an imitation of a well-known mark used in another contracting state for a similar product. This encourages persons in Angola to register famous marks of multinational companies and to force such companies to buy them back when they eventually decide to do business in Angola.

Fifth, the juridical protection of intellectual property provided for in the statute is extremely weak. There is no provision for injunctive relief against infringers or confiscation of their inventory. Instead, intellectual property protection under this law is basically limited to fines of 20,000 to 100,000 NKz, which is less than a dollar at today's exchange rate. The criminal law provisions of the Law of Crimes against the Economy, Law 9/89, do provide stronger protection for certain offenses. For example, sales of falsified products are punishable by one year in jail under Art. 34, but the prosecution must prove the seller knew the product was falsified. Also Art. 20 punishes persons who reveal trade secrets by sentences of 2 to 8 years, paradoxically providing greater protection to non-patented rights than to patents.

Adequate legal protection of intellectual property rights requires a strong, efficient, and independent judiciary. Even if the written law provided adequate protection, which it does not, intellectual property rights would still be inadequately protected without serious strengthening of the judiciary.

19. Expropriation

Art. 8(3) of the FIL provides that in the event of expropriation, the government will pay "just, prompt and effective compensation." There is a discordance between the English translation provided to me and the Portuguese original of the FIL with respect to how compensation will be determined. The Portuguese simply says the amount of compensation shall be determined "de acordo com as regras com recurso a arbitragem," while the translation of the statute says the amount of compensation will be determined according to the common rules and practice of international law or by arbitration. Art. 35 of the Regulations tracks the language of the English translation rather than the Portuguese original.

Article 35 of the Regulations also indicates what procedure shall be followed for arbitration. Each side appoints an arbitrator, and the two arbitrators choose the third. If the arbitrators fail to agree on a third, a prestigious Angolan magistrate shall be the third; however, the Regulations are silent as to how this judge is to be selected. Nor do they state where the arbitration is to be held and under what procedural rules. Art. 35(3) of the Regulations states that the rest of this article does not prejudice appeals to international courts in accordance with international conventions to which Angola is a party.

Counsel for any prospective international investor would like to know what are the international conventions to which Angola is a party. As of June 1995, Angola was not a signatory to the Convention on the Settlement of Investment Disputes of the International Centre for Settlement of Investment Disputes (ICSID), a useful convention that has already been signed 134 countries. Angola is, however, one of the 154 countries that have agreed to host the Multilateral Investment Guarantee Agency (MIGA), which provides insurance to foreign investors against certain risks such as expropriation, non-convertibility, and war or civil disturbance. It is also one of the 140 countries that has agreed to host the Overseas Private Investment Corporation (OPIC), which insures U.S. foreign investors against similar risks.

The FIL has a good provision on compensation standards, but it would be far better if the FIL contained a comprehensible definition of what constitutes an expropriation. For example, if a foreign investor's concession of the right to use 5,000 hectares of agrarian land to cultivate coffee is revoked because the government deems that the land is not being adequately cultivated, has there been an expropriation? If price controls force an investor to operate at a loss, or exchange controls prevent him from remitting profits and repatriating capital for five years, has there been an expropriation?

From the investor's perspective the FIL would be much better if there were recourse to arbitration abroad under the rules of the World Bank or some other international body. Moreover, this guarantee is contained only in a statute, which can be easily amended. The FIL's guarantee would also be better if it were coupled with a strong constitutional guarantee of private property. Unfortunately, Angola's constitutional guarantee is very weak. Article 11(4) of the Constitutional Law merely states: "The State protects foreign investment and the property of foreign investors in accordance with the terms of the law." Article 12(4) suffers from the same infirmity, stating: "The State respects and protects the property of persons, be they individuals or legal entities ... without prejudice to the possibility of expropriation for public use in the terms of the law." Since, these constitutional guarantees of private property have no greater validity or immutability than ordinary laws, they do not inspire investor confidence. The matter is made even worse by Article 13 which states: "All the juridical effects of acts of nationalization and confiscation performed under the auspices of a competent law are considered valid and irreversible without prejudice to what is provided for in specific legislation on reprivatization." The Diário da República is replete with Decretos and Despachos confiscating private property because of the unjustified absence of the proprietor for more than 45 days, citing to Law 3 of Mar. 3, 1976. These weak constitutional guarantees of property rights and undisguised confiscations create a juridical climate of insecurity for all investors, be they foreign or domestic. To make itself even more attractive to foreign investors, Angola should adhere to the World Bank's Convention on the Resolution of Investment Disputes. It should also explore signing bilateral agreements with the OECD countries.

20. Taxation

An important component of the foreign investment scene is the tax structure. Unfortunately, copies of the tax code and other fiscal legislation were not available to me. With a 40% basic income tax and 10% additional tax, Angola is clearly not a tax haven. Although the government has indicated it intends to negotiate tax treaties to prevent double taxation, I have not been able to find any treaties that have actually gone into force. Negotiation of such agreements would be a useful step in stimulating foreign investment, for without them, a foreign investor frequently is taxed twice on the same income.

Angola offers fiscal incentives to certain kinds of investment, but none of the legislation with which I was supplied covered these incentives.

21. Conclusions

The basic approach of the much of the legislation by which Angola regulates foreign investment is obsolete. Both patrimonialism and planned economies are products of bygone eras, and the approaches of the FIL, the Diamond Law, the Petroleum Law, and the Mining Law reflect aspects of both. It would be far preferable to register foreign investment automatically except for concessions. Even in that area, it would seem to make more sense to replace a regime of state monopolies and negotiated concessions with a system of taxation and regulation in which clear rules are applied across the board. Regimes in which special deals are continually negotiated mean little transparency and inevitably result in a great deal of corruption. From the perspective of a lawyer who has studied many foreign investment laws, the FIL is far more likely to dissuade than to attract the average foreign investor.